

# **APPENDIX A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

WSOU INVESTMENTS, LLC d/b/a BRAZOS  
LICENSING AND DEVELOPMENT,

Plaintiff,

v.

DELL TECHNOLOGIES INC., DELL INC.,  
EMC CORPORATION, AND VMWARE,  
INC.,

Defendants.

Case No. 6:20-cv-00481-ADA

**JURY TRIAL DEMANDED**

**LETTER OF REQUEST: REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE  
PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING  
OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS**

GREETINGS:

1. Sender	The Honorable Judge Alan D Albright, District Judge United States District Court for the Western District of Texas, Waco Division 800 Franklin Avenue Room 301 Waco, Texas 76701 USA
2. Central Authority of the Requested State	In compliance with provisions of the Code of Civil Procedure of the requested state, the letter of request may be addressed to:  The Registrar Honourable Punjab and Haryana High Court at Chandigarh Capitol Complex, Sector 1, Chandigarh - 160001
3. Person to whom the executed request is to be returned	The executed request Court; representatives of the parties as indicated below; the witnesses from whom evidence is requested as indicated below; such other

	<p>person(s) that you deem proper; and Defendants's legal counsel in India:</p> <p><b>Akhilesh Kumar Rai</b>  AZB &amp; PARTNERS  Unitech Cyber Park  602, Tower B  6th Floor, Sector 39  Gurgaon 122 001  National Capital Region  India  Mob: +91 9810344195   Tel: +91 124 4841300    Fax: +91 124 4841319  Email: akhileshkumar.raai@azbpartners.com</p>
4. Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request	June 1, 2021

In conformity with Article 3 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"), Federal Rule of Civil Procedure 28(b), and 28 U.S.C.A. 1781(b), the undersigned authority respectfully has the honor to submit the following request:

5. a. Requesting Judicial Authority (Article 3, a)	<p>The Honorable Judge Alan D Albright, District Judge  United States District Court for the Western District  of Texas, Waco Division  800 Franklin Avenue Room 301  Waco, Texas 76701  USA</p>
b. To the competent Authority of (Article 3, a)	<p>India.</p> <p>Pursuant to Order 26 Rule 19 of the (Indian) Code of Civil Procedure 1908, since the proposed witness resides in the city of Gurugram, the Honourable High Court of Punjab and Haryana at Chandigarh would be</p>

	competent to receive the request and issue commission in terms of the request.
c. Names of the case and any identifying number	<i>WSOU Investments LLC v. Dell Technologies Inc.</i> Case No. 6:20-cv-00481-ADA, United States District Court for the Western District of Texas
6. Names and addresses of the parties and their representative (including representatives in the requested State) (Article 3, b)	
a. Plaintiffs	WSOU Investments LLC
Representatives	<p>WSOU is represented by:</p> <p><b>Brett Aaron Mangrum</b> Etheridge Law Group 2600 East Southlake Blvd., Suite 120-324 Southlake, TX 76092 469-401-2659 Fax: 817-887-5950 Email: brett@etheridgelaw.com</p> <p><b>Jeffrey Huang</b> Etheridge Law Group PLLC 2600 East Southlake Blvd Suite 120-324 Southlake, TX 76092 408-797-9059 Fax: 817-887-5950 Email: jhuang@etheridgelaw.com</p> <p><b>Ryan Scott Loveless</b> Etheridge Law Group PLLC 2600 E Southlake Blvd Suite 120-324 Southlake, TX 76092 972-292-8303 Fax: 817-887-5950 Email: ryan@etheridgelaw.com</p> <p><b>James L. Etheridge</b> Etheridge Law Group, PLLC 2600 E. Southlake Blvd., Suite 120-324</p>

	Southlake, TX 76092 817-470-7249 Fax: 817-887-5950 Email: jim@etheridgelaw.com
b. Defendants	Dell Technologies Inc., Dell Inc., EMC Corporation, and VMware Inc. (collectively “Defendants”)
Representatives	<p>Dell Technologies Inc., Dell Inc., EMC Corporation,  and VMware Inc. are represented by:</p> <p>Shelton Coburn LLP:</p> <p><b>Barry K. Shelton</b>  Shelton Coburn LLP  311 RR 620 S  Suite 205  Austin, TX 78734-4775  512-263-2165  Fax: 512-263-2166  Email: bshelton@sheltoncoburn.com</p> <p>The Defendant has appointed legal counsel in India to  pursue and assist with the commission to take  evidence. The details of the Defendant’s legal counsel  in India are:</p> <p><b>Akhilesh Kumar Rai</b>  AZB &amp; PARTNERS  Unitech Cyber Park  602, Tower B  6th Floor, Sector 39  Gurgaon 122 001  National Capital Region  India  Mob: +91 9810344195   Tel: +91 124 4841300    Fax: +91 124 4841319  Email: akhileshkumar.raai@azbpartners.com</p>
c. Other parties	N/A
Representatives	N/A

<p>7. a. Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (Article 3, c)</p>	<p>Civil action alleging patent infringement under the patent laws of the United States.</p>
<p>b. Summary of complaint</p>	<p>Discovery sought in this Letter of Request is relevant in Case No. 6:20-cv-00481-ADA: In WSOU's complaint against Defendants, WSOU alleges that Defendants infringe U.S. Patent No. 9,164,800 ("the '800 patent").</p>
<p>c. Summary of defense and counterclaim</p>	<p>In defense against WSOU's claims of patent infringement of the '800 patent, Defendants assert, <i>inter alia</i>, that they do not infringe any of claims of the '800 patent and that the '800 patent is invalid.</p> <p>Alcatel-Lucent India Ltd. has knowledge of the facts relevant to Defendants' defenses. Alcatel-Lucent India Ltd. is relevant to the action by virtue of being a former assignee of the '800 patent. Alcatel-Lucent India Ltd. holds critical facts to this case, including facts relevant to a number of defenses raised by Defendants and any potential damages, including information related to the prosecution of the '800 patent; prior uses and/or sales or products and services incorporating the '800 patent, publications related to the concepts claimed in the '800 patent; commercialization, production and/or commercial embodiments related to the '800 patent; the state of the art at the time of the alleged invention and/or filing of the applications related to the '800 patent; the ownership and financial interests in the '800 patent; conception, diligence and/or reduction to practice of the concepts claimed in the '800 patent; and the disclosure of the claimed invention of the asserted patent. As well as licensing of and/or agreements covering the '800 patent. And, financial knowledge including valuation and royalties associated with the '800 patent or any license and/or agreement covering the '800 patent; and other financial interests (including revenue, costs, expenses and profits) as well as financial interests and information related to the '800 patent.</p>

d. Other necessary information or documents	<p>Alcatel-Lucent India Ltd.'s current address is:</p> <p>Info Technology Park Sector 34 Gurugram, Haryana 122 004, India</p>
8. a. Evidence to be obtained or other judicial act to be performed (Article 3d),	<p>In order to present its defenses that the '800 patent is not infringed, invalid, and unenforceable and to determine any alleged damages, Defendants seek certain documents from Alcatel-Lucent India Ltd. Attached as Exhibit A1 is a request of production of certain documents that Defendants believe are likely to be in the possession, custody, or control of Alcatel-Lucent India Ltd.</p> <p>To further clarify the evidence sought, attached as Exhibit A2 is an outline of the topics and issues about which counsel for Defendants intend to inquire of Alcatel-Lucent India Ltd.</p>
b. Purpose of the evidence or judicial act sought	<p>With respect to the '800 patent, Alcatel-Lucent India Ltd. has information and knowledge relating to the prosecution of the '800 patent; prior uses and/or sales or products and services incorporating the '800 patent, publications related to the concepts claimed in the '800 patent; commercialization, production and/or commercial embodiments related to the '800 patent; the state of the art at the time of the alleged invention and/or filing of the applications related to the '800 patent; the ownership and financial interests in the '800 patent; conception, diligence and/or reduction to practice of the concepts claimed in the '800 patent; and the disclosure of the claimed invention of the asserted patent. As well as licensing of and/or agreements covering the '800 patent. And, financial knowledge including valuation and royalties associated with the '800 patent or any license and/or agreement covering the '800 patent; and other financial interests (including revenue, costs, expenses and profits) as well as financial interests and information related to the '800 patent.</p> <p>This evidence is directly relevant to Defendants' claims that the '800 patent is not infringed, invalid, and</p>

	unenforceable and to determine any alleged damages under United States patent law.
9. Identity and address of any person to be examined (Article 3, e)	Alcatel-Lucent India Ltd.  Info Technology Park Sector 34 Gurugram, Haryana 122 004, India
10. Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined (Article 3, f)	<i>See Exhibit A2</i>
11. Documents or other property to be inspected (Article 3, g)	<i>See Exhibit A1</i>
12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (Article 3, h)	We respectfully request that the testimony be taken under oath.
13. Special methods or procedure to be followed (e.g. oral or in writing, verbatim, transcript or summary, cross-examination, etc.) (Article 3, i) and 9)	<p>This Court respectfully requests that Alcatel-Lucent India Ltd. be directed to produce the documents identified in attached Exhibit A1.</p> <p>This Court respectfully requests that the Central Authority direct a representative of Alcatel-Lucent India Ltd. to appear on or before June 1, 2021.</p> <p>This Court respectfully requests that attorneys of the Defendant be permitted to examine and cross-examine a representative of Alcatel-Lucent India Ltd., and that the witness be directed to answer such questions, relating to matters outlined in attached Exhibit A2.</p> <p>This Court respectfully requests that the examination be permitted to be conducted in accordance with the Federal Rules of Evidence and the Federal Rules of Civil Procedure to prevail in the event of a conflict.</p>



	<p>This Court respectfully requests that the examination be (partially) conducted via video conference to allow U.S. counsel to join the hearing.</p> <p>This Court respectfully requests that the testimony be video recorded and also transcribed verbatim.</p> <p>This Court respectfully requests that the testimony be taken in English language if the examined person(s) agree, and that, if need be, simultaneous translation be provided.</p> <p>Costs incurred in relation to the deposition examination (court reporter, video recorder, simultaneous translation) shall be at Defendants' expense.</p>
14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (Article 7)	This Court respectfully requests that you notify this Court; the representatives of the parties as indicated above; the witness from whom evidence is requested as indicated above; and such other person(s) that you deem proper.
15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (Article 8)	No judicial personnel of the requesting authority will attend or participate.
16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (Article 11, b)	Defendants believe that Alcatel-Lucent India Ltd. does not benefit from any privilege, and does not endorse the assertion of any such privilege or duty.
17. The fees and costs incurred which are reimbursable under the second paragraph of Article 14 or under Article 26 of the Convention will be borne by	Defendants will bear the reimbursable costs associated with this request in accordance with the provisions of the Hague Convention.

So ORDERED and SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2020.

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The Honorable Alan D Albright  
U.S. District Court Judge

# **EXHIBIT A1**

## **DOCUMENTS REQUESTED**

Defendants Dell Technologies Inc., Dell Inc., EMC Corporation, and VMware, Inc. (collectively, “Defendants”) request the production of the documents described below.

## **DEFINITIONS**

The following definitions are applicable to terms employed in responding to this request:

1. “Accused Product” or “Accused Products” shall refer to any device, product, or other thing that Plaintiff is permitted to accuse of infringing the Asserted Patent in this Action. A copy of the Complaint in case number 6:20-cv-00481-ADA is attached as Exhibit A3. In referring to any device, product, or other thing as an “Accused Product,” Defendants in no way communicate their agreement that it infringes the Asserted Patent.
2. “Action” shall refer to the above-captioned proceeding in the United States District Court for the Western District of Texas, with case number 6:20-cv-00481-ADA.
3. “Asserted Claim” shall refer to each claim of the Asserted Patent that Plaintiff contends Defendants infringe.
4. “Asserted Patent” shall refer to U.S. Patent No. 9,164,800 and any patent applications related thereto.
5. “Communication” shall mean, without limitation, any written, oral, or other transmission of information, including but not limited to emails.
6. “Complaint” shall refer to the Complaint (including exhibits) that Plaintiff filed on June 2, 2020 as docket number 1 in this Action, as may be amended.
7. “Concerning,” “refer(s) to,” “related to,” “reflecting,” and “relating to” shall mean directly or indirectly relating to, referring to, mentioning, reflecting, pertaining to, evidencing, illustrating, involving, describing, discussing, commenting on, embodying, responding to,

supporting, contradicting, or constituting (in whole or in part), as the context makes appropriate.

8. “Defendants” or “Defendant” shall refer to Dell Technologies Inc., Dell Inc., EMC Corporation, and VMware, Inc., and any and all of their then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
9. “Document” shall include, without limitation, all documents, electronically stored information, and tangible things within the scope of the Federal Rules of Civil Procedure, including Rule 34. Federal Rules of Civil Procedure 34 permits discovery of: “(A) documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things.”
10. “Employee” shall refer to any officer, director, partner, employee, representative, or agent.
11. “Licensee(s)” shall refer to any entity having a license, assignment, covenant not to sue, or other understanding, written, oral or implied, that the entity has any rights to the Asserted Patent, any Related Patents, or any Related Applications, may practice one or more claims of the Asserted Patent and/or that Plaintiff will not file suit or otherwise enforce against that entity one or more claims of the Asserted Patent or any Related Patent or Related Application.

12. “Named Inventor” shall refer to any individual who is listed as an inventor on the Asserted Patent or any Related Patent or Related Application thereof.
13. “Person” shall refer to any natural person, firm, association, partnership, government agency, corporation, proprietorship, or other entity and its officers, directors, partners, employee, representatives, and agents.
14. The terms “Plaintiff,” and/or “WSOU” shall refer to the responding Plaintiff WSOU Investments, LLC d/b/a Brazos Licensing and Development, and any and all of its then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
15. “Prior Art” encompasses, without limitation, the subject matter described in each and every subdivision of 35 U.S.C. §§ 102 and 103, and includes, but is not limited to, memoranda, notes, manuals, interviews, testing data, disclosures, prototypes, correspondence, drawings, papers, articles, patents, printed publications, public uses, demonstrations, offers for sale or license, and sales.
16. “Related Application(s)” means any and all applications related to the Asserted Patent, including any provisional or non-provisional applications, continuations, continuations-in-part, divisions, interferences, reexaminations, re-issues, parents, foreign counterpart applications, and any other applications disclosing, describing or claiming any invention disclosed, described or claimed in the Asserted Patent, or claiming the benefit of the filing date of any application whose benefit is claimed in the Asserted Patent, whether or not abandoned and whether or not issued.

17. “Related Patent(s)” means any and all U.S. or foreign patents based upon or related to any Related Application(s) or Asserted Patent, including any patents or applications that may have been opposed, reexamined, re-issued or subjected to any validity or nullity proceeding.
18. “Third Party” shall refer to any person other than Plaintiff or Defendants.
19. “You,” “Your,” “Yours” shall refer to Alcatel-Lucent India Ltd., and any and all of its then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
20. “Product(s)” means a machine, manufacture, apparatus, device, instrument, mechanism, appliance, software, service, process, or an assemblage of components/parts (either individually or collectively) that are designed to function together electronically, mechanically, or otherwise, including any offered for sale or under development.
21. Any pronouns shall be construed to refer to the masculine, feminine, or neutral gender, in singular or plural, as in each case is most appropriate.
22. The singular form of any word shall be construed to also include the plural, and vice-versa.
23. The word “each” shall be construed to mean “each and every.”
24. The words “and” and “or” shall be construed conjunctively or disjunctively, whichever makes the request more inclusive.
25. The words “any” and “all” shall be construed to mean “any and all.”

## **INSTRUCTIONS**

1. In responding to the document requests set forth below, please furnish all responsive and non-privileged information that is available to You.
2. If production of any responsive Documents are being withheld on the ground of the attorney-client privilege, attorney work product, or any other privilege, immunity, or protection, please provide a privilege log with the following information for each such Document: (a) the name of the Document; (b) the name of the person(s) who prepared the Document; (c) the name of the person(s) to whom the Document was directed or circulated; (d) the date(s) on which the Document was prepared or transmitted; (e) the name of the person(s) now in possession of the Document; (f) a description of the subject matter of the Document; and (g) the specific nature of the privilege or protection claimed with respect to the Document.
3. The Court's interim protective order in the Order Governing Proceedings entered in this manner shall govern the disclosure of confidential information in this Action. *See* Exhibit A4 at pp. 3–4.
4. Upon entry of a final protective order in this manner that protective order shall govern the disclosure of confidential information in this Action.

## **DOCUMENT REQUESTS**

1. Documents and Communications concerning the preparation, filing, or prosecution of any of the patent applications related to the Asserted Patent.<sup>1</sup> This includes, but

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<sup>1</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as prosecution history estoppel, non-infringement, invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement), and inequitable conduct. Such materials



is not limited to:

- a. A complete copy of the prosecution history and prosecution files for the Asserted Patent;
  - b. Drafts of the patent applications, drawings, and documents in the possession, custody, or control of You or any attorney or agent involved in the prosecution of the Asserted Patent, except to the extent these documents are entitled to attorney-client privilege or work product protection;
  - c. Patents, patent applications, or other publications reviewed in connection with the prosecution by anyone who participated in the prosecution of the Asserted Patent;
  - d. Prior Art cited or considered in connection with the prosecution of the Asserted Patent;
  - e. Memoranda and Communications regarding the prosecution of the Asserted Patent; and
  - f. Documents referring or relating to or evidencing any decision by You, on Your behalf, or that you are aware of regarding what documents (including without limitation patents or printed publications) to cite during prosecution of the Asserted Patent.
2. Documents and Communications concerning the preparation, filing, or

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will also be relevant to defenses relating to damages, including the availability of non-infringing alternatives.

prosecution of any of the patent applications related to Related Patents and Related Applications.<sup>2</sup>

This includes, but is not limited to:

- a. A complete copy of the prosecution histories and prosecution files for any Related Patents and Related Applications;
- b. Drafts of patent applications, drawings, and documents in the possession, custody, or control of You or any attorney or agent involved in the prosecution of any Related Patents or Related Applications, except to the extent these documents are entitled to attorney-client privilege or work product protection;
- c. Patents, patent applications, or other publications reviewed in connection with the prosecution by anyone who participated in the prosecution of any Related Patents or Related Applications;
- d. Prior Art cited or considered in connection with the prosecution of any Related Patents or Related Applications;
- e. Memoranda and Communications regarding the prosecution of any Related Patents or Related Applications; and
- f. Documents referring or relating to or evidencing any decision by You, on Your behalf, or that you are aware of regarding what documents (including without limitation patents or printed publications) to cite

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<sup>2</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as prosecution history estoppel, non-infringement, invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement), and inequitable conduct. Such materials will also be relevant to defenses relating to damages, including the availability of non-infringing alternatives.

during prosecution of any Related Patents or Related Applications.

3. Documents and Communications related to each effort by You, on Your behalf, or that you are aware of to obtain patent protection, in the United States or in the countries designated in the PCT application for the Asserted Patent, for the subject matter described and/or claimed in the Asserted Patent, covering the period from October 25, 2012 through the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>3</sup>

4. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the conception of the subject matter described and/or claimed in the Asserted Patent, prior to October 25, 2012.<sup>4</sup>

5. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the testing, design, and development of the subject matter described and/or claimed in the Asserted Patent, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>5</sup>

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<sup>3</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>4</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>5</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

6. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the reduction to practice of the subject matter described and/or claimed in the Asserted Patent, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>6</sup>

7. Statements, articles, abstracts, publications, and Product literature made by, or under the direction of, any of the Named Inventors concerning the subject matter described and/or claimed in the Asserted Patent, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>7</sup>

8. Laboratory notebooks, technical memoranda, technical files, diaries, appointment calendars, and trip reports, in complete unredacted form, of the Named Inventors, or made under the direction of the Named Inventors, concerning the subject matter described and/or claimed in the Asserted Patent, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>8</sup>

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<sup>6</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>7</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>8</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description,

9. Documents sufficient to identify any Person (whether or not named as an inventor) involved in the conception, research, testing, design, development, and reduction to practice of any element of any of the inventions described and/or claimed in the Asserted Patent, and to understand their role, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>9</sup>

10. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the conception of the subject matter described and/or claimed in Related Patents or Related Applications, prior to October 25, 2012.<sup>10</sup>

11. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the testing, design, and development of the subject matter described and/or claimed in Related Patents or Related Applications, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>11</sup>

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indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>9</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>10</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>11</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

12. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding the reduction to practice of the subject matter described and/or claimed in Related Patents or Related Applications, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>12</sup>

13. Statements, articles, abstracts, publications, and Product literature made by, or under the direction of, any of the Named Inventors concerning the subject matter described and/or claimed in Related Patents or Related Applications, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>13</sup>

14. Laboratory notebooks, technical memoranda, technical files, diaries, appointment calendars, and trip reports, in complete unredacted form, of the Named Inventors, or made under the direction of the Named Inventors, concerning the subject matter described and/or claimed in Related Patents or Related Applications, prior to the last action taken by or on behalf of the inventor or any assignee in connection with the prosecution of the Asserted Patent or any Related Patent or Related Application.<sup>14</sup>

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<sup>12</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>13</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>14</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description,

15. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums that concern or show the structure, functions, or operation of, or that constitute embodiments of, any invention disclosed or claimed in the Asserted Patent, regardless of whether such embodiment was commercialized, and regardless of whether or not it worked properly, from October 25, 2012 to the present.<sup>15</sup>

16. Documents and Communications relating to Your assignment policies with inventors applicable to the invention described and/or claimed in the Asserted Patent.<sup>16</sup> This includes but is not limited to:

- a. Assignment agreements with the inventors of the inventions described and/or claimed in the Asserted Patent;
- b. Cost-sharing or profit-sharing agreements with the inventors of the inventions described and/or claimed in the Asserted Patent; and
- c. Remuneration agreements with inventors of the inventions described

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indefiniteness, and enablement). Such materials will also be relevant to defenses, such as improper inventorship, derivation, and inequitable conduct.

<sup>15</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to defenses relating to damages, including the availability of non-infringing alternatives and failure to mark.

<sup>16</sup> Such materials will be relevant to issue regarding Plaintiffs standing to bring the current suit and joinder of the proper parties. Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “the character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1119–20 (S.D.N.Y. 1970). Courts in the United States consider these *Georgia-Pacific* factors when determining a reasonable royalty for patent infringement damages. See, e.g., *Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F. 3d 1301, 1324–37 (Fed. Cir. 2009).

and/or claimed in the Asserted Patent.

17. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums concerning any of the following activities with regard to the subject matter described and/or claimed in the Asserted Patent:

- a. First written description and/or drawing of such subject matter;
- b. First publication of such subject matter;
- c. First promotion of such subject matter;
- d. First advertisement of such subject matter;
- e. First offer for sale of such subject matter;
- f. First sale of such subject matter;
- g. First public disclosure of such subject matter;
- h. First public use of such subject matter;
- i. Experimental uses or alleged experimental uses of such subject matter.<sup>17</sup>

18. Documents concerning the making, using, testing, selling, or disclosure, anywhere in the world, of any embodiment described and/or claimed in the Asserted Patent, or any Product, process, equipment, or service embodying or using such invention, prior to October 25, 2012.<sup>18</sup>

19. Documents relating to any Prior Art search performed by You, on Your behalf, or that you are aware of, relating to the Asserted Patent, including, but not limited to, any search

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<sup>17</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness, secondary considerations regarding obviousness, and anticipation) and inequitable conduct.

<sup>18</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness, secondary considerations regarding obviousness, and anticipation) and inequitable conduct.



methodology or results, prior to November 21, 2013.<sup>19</sup>

20. Documents relating to any Prior Art search performed by You, on Your behalf, or that you are aware of, relating to any Related Patent or Related Application, including, but not limited to, any search methodology or results, from October 1, 2012 to November 21, 2013.<sup>20</sup>

21. Communications, studies, comparisons, reports, surveys, evaluations, opinions, or memorandums regarding whether any claim in the Asserted Patent is invalid, valid, enforceable, or unenforceable (including any Prior Art or alleged Prior Art), prior to November 21, 2013.<sup>21</sup>

22. Documents that concern the commercial success (a secondary consideration regarding obviousness of the Asserted Patent as considered under 35 U.S.C. § 103) of any Product, process, equipment, or service that has a nexus to any invention claimed in the Asserted Patent (i.e., the Product, process, equipment, or service is “essentially the claimed invention”<sup>22</sup>), from October 25, 2012 to November 21, 2013.<sup>23</sup>

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<sup>19</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness, secondary considerations regarding obviousness, and anticipation) and inequitable conduct.

<sup>20</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness, secondary considerations regarding obviousness, and anticipation) and inequitable conduct.

<sup>21</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement) and inequitable conduct.

<sup>22</sup> *Fox Factory, Inc. v. SRAM, LLC*, 944 F. 3d 1366, 1374 (Fed. Cir. 2019).

<sup>23</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness and secondary considerations regarding obviousness). Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “the character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1119–20 (S.D.N.Y. 1970). Courts in the United States consider these *Georgia-Pacific* factors when determining a reasonable royalty for patent infringement damages. *See, e.g., Lucent Technologies, Inc. v. Gateway, Inc.*, 580 F. 3d 1301, 1324–37 (Fed. Cir. 2009).

23. Documents that concern any copying by others (a secondary consideration regarding obviousness of the Asserted Patent as considered under 35 U.S.C. § 103) of any invention claimed in the Asserted Patent, or of any Product, process, equipment, or service that embodies or uses such invention, from October 25, 2012 to November 21, 2013.<sup>24</sup>

24. Documents that concern any third party's praise, criticism, acknowledgments, awards, or discussion of the significance (a secondary consideration regarding obviousness of the Asserted Patent as considered under 35 U.S.C. § 103) of any invention claimed in the Asserted Patent, or of any Product, process, equipment, or service that embodies or uses such invention, from October 25, 2012 to November 21, 2013.<sup>25</sup>

25. Communications (or Documents relating thereto) between You and Plaintiff, from October 1, 2012 to the present, relating to:

- a. The Asserted Patent, Related Patents, Related Applications, or any inventions disclosed therein;
- b. This Action (including, without limitation, the initiation of this Action and the actual or anticipated costs, profits, and outcome of this Action); and
- c. Any Defendant, any of Defendants' technology, or any of the Accused Products.<sup>26</sup>

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<sup>24</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness and secondary considerations regarding obviousness).

<sup>25</sup> Such materials will be relevant to defenses, such as invalidity (including obviousness and secondary considerations regarding obviousness).

<sup>26</sup> Such materials will be relevant to quantifying any alleged damages. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

26. Communications (or Documents relating thereto) between You and any of the Named Inventors, from October 1, 2012 to the present, relating to:

- a. The Asserted Patent, Related Patents, Related Applications, or any inventions disclosed therein;
- b. This Action (including, without limitation, the initiation of this Action and the actual or anticipated costs, profits, and outcome of this Action); and
- c. Any Defendant, any of Defendants' technology, or any of the Accused Products.<sup>27</sup>

27. Negotiations, agreements, draft agreements between You and Plaintiff, from October 1, 2012 to the present, relating to:

- a. The Asserted Patent, Related Patents, Related Applications, or any inventions disclosed therein;
- b. This Action (including, the initiation of this Action and the actual or anticipated costs, profits, and outcome of this Action); or
- c. Any Defendant, any of Defendants' technology, or any of the Accused Products.<sup>28</sup>

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<sup>27</sup> Such materials will be relevant to quantifying any alleged damages. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>28</sup> Such materials will be relevant to quantifying any alleged damages. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

28. Negotiations, agreements, draft agreements between You and any Named Inventor, from October 1, 2012 to the present, relating to:

- a. The Asserted Patent, Related Patents, Related Applications, or any inventions disclosed therein;
- b. This Action (including the initiation of this Action and the actual or anticipated costs, profits, and outcome of this Action); or
- c. Any Defendant, any of Defendants' technology, or any of the Accused Products.<sup>29</sup>

29. Documents and Communications concerning any statement, concern, or contention by You, any Named Inventor, or any person involved in the prosecution of the Asserted Patent, regarding the scope of any of the claims or the interpretation or construction of any term or phrase in the claims of the Asserted Patent, prior to November 21, 2013.<sup>30</sup>

30. Documents concerning the alleged infringement of any of the claims of the Asserted Patent, including studies, comparisons, reports, surveys, and any evaluation, opinion, memorandum, or report, comparing any of the Accused Products or any portion, feature, and/or aspect thereof to any limitation in any claim of the Asserted Patent, prior to November 21, 2013.<sup>31</sup>

31. Documents and Communications concerning any decision to pursue or not to

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<sup>29</sup> Such materials will be relevant to quantifying any alleged damages. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>30</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement) and inequitable conduct.

<sup>31</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement.

pursue a claim infringement of the Asserted Patent against any Defendant, from October 1, 2012 to November 21, 2013.<sup>32</sup>

32. Documents and Communications concerning any decision to pursue or not to pursue a claim infringement of any Related Patent against any Defendant, from October 1, 2012 to November 21, 2013.<sup>33</sup>

33. Documents comprising or memorializing any sworn statements, including affidavits, declarations, trial and deposition testimony related to the subject matter of the Asserted Patent, by any of the Named Inventors or any person involved in the prosecution of the Asserted Patent.<sup>34</sup>

34. Documents comprising or memorializing any sworn statements, including affidavits, declarations, trial and deposition testimony related to the subject matter of any Related Patents or Related Applications, by any of the Named Inventors or any person involved in the prosecution of the Asserted Patent.<sup>35</sup>

35. Documents and Communications, relating to or concerning the assignment, licensing, acquisition, financial interest, security interest, sale, transfer of rights (in whole or in

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<sup>32</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the “commercial relationship between the licensor and licensee”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>33</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the “commercial relationship between the licensor and licensee”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>34</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement) and inequitable conduct.

<sup>35</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement) and inequitable conduct.

part), or any other disposition of, or any offers to buy, sell, or license the Asserted Patent or any Related Patents or Related Applications.<sup>36</sup> This includes, but is not limited to:

- a. Agreements granting rights, assignments, licenses, covenants, royalties, settlements, agreements releasing any third party from liability for infringement, and covenants not to sue, involving or concerning the Asserted Patent, Related Patents, or Related Applications;
- b. Negotiations, discussions, or other Communications relating to the Documents referenced in sub-paragraph a; and
- c. Communications (or documents relating thereto) between You and any potential Licensee or purchaser of the Asserted Patent, Related Patents or Related Applications.

36. Documents and Communications sufficient to identify any and all entities that have acquired any right, financial interest, or security interest in the Asserted Patent.<sup>37</sup>

37. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums,

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<sup>36</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>37</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

regarding ownership of the Asserted Patent, from October 1, 2012 to November 21, 2013.<sup>38</sup>

38. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums, regarding any standstills involving or concerning the Asserted Patent, from October 1, 2012 to November 21, 2013.<sup>39</sup>

39. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums, regarding sales, royalties, covenants, or licenses involving or concerning the Asserted Patent, from October 1, 2012 to November 21, 2013.<sup>40</sup>

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<sup>38</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>39</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>40</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

40. Documents and Communications concerning any business plans, marketing plans, marketing efforts, advertising plans, advertising efforts, promotional programs, or offers for sale, involving or concerning the Asserted Patent, from October 1, 2012 to November 21, 2013.<sup>41</sup>

41. Documents and Communications sufficient to identify any and all entities that have acquired any right, financial interest, or security interest in Related Patents or Related Applications.<sup>42</sup>

42. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums, regarding ownership of Related Patents or Related Applications, from October 1, 2012 to November 21, 2013.<sup>43</sup>

43. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums, regarding any standstills involving or concerning Related Patents or Related Applications, from

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<sup>41</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>42</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>43</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).



October 1, 2012 to November 21, 2013.<sup>44</sup>

44. Studies, comparisons, reports, surveys, evaluations, opinions, or memorandums, regarding sales, royalties, covenants, or licenses involving or concerning Related Patents or Related Applications, from October 1, 2012 to November 21, 2013.<sup>45</sup>

45. Documents and Communications concerning any business plans, marketing plans, marketing efforts, advertising plans, advertising efforts, promotional programs, or offers for sale, involving or concerning Related Patents or Related Applications, from October 1, 2012 to November 21, 2013.<sup>46</sup>

46. Documents and Communications concerning any budgets, forecasts, revenues, licensing strategies, projections, costs, sales, expenses, margins, profits (including gross and net

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<sup>44</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>45</sup> Such materials will be relevant to license exhaustion defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20. Such materials will also be relevant to defenses, such as non-infringement and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>46</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

profits), or any other means for generating revenue from any Product, process, equipment, or service that You allege or believe embodies any claim of the Asserted Patent, from October 1, 2012 to present.<sup>47</sup>

47. Documents related to the relationship between You and potential or actual Licensees regarding the Asserted Patent, including agreements and draft agreements with such potential Licensees, Communications with such potential Licensees, and Documents exchanged with such potential Licensees that relate to such patents.<sup>48</sup>

48. Documents related to the relationship between You and potential or actual Licensees regarding the Related Patents or Related Applications, including agreements and draft agreements with such potential Licensees, Communications with such potential Licensees, and Documents exchanged with such potential Licensees that relate to such patents.<sup>49</sup>

49. Documents reflecting any analyses or projections regarding the financial impact and duration thereof on You or any other assignee or Licensee due to the alleged infringement of

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<sup>47</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>48</sup> Such materials will be relevant to patent exhaustion and license defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>49</sup> Such materials will be relevant to patent exhaustion and license defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

the Asserted Patent, from October 1, 2012 to November 21, 2013.<sup>50</sup>

50. Valuations of the Asserted Patent (either alone, or together with other patents or consideration, including as part of an intellectual property portfolio), from October 1, 2012 to November 21, 2013.<sup>51</sup>

51. Valuations of the Related Patents or Related Applications (either alone, or together with other patents or consideration, including as part of an intellectual property portfolio), from October 1, 2012 to November 21, 2013.<sup>52</sup>

52. Documents and Communications concerning or relating to an appraisal or valuation of any license, covenant, royalty, technology transfer, or authorization-to-use agreement that relates to the Asserted Patent, including appraisals or valuations performed for tax purposes, from October 1, 2012 to November 21, 2013.<sup>53</sup>

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<sup>50</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>51</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>52</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>53</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product

53. Documents and Communications concerning or relating to any right, title, or interest in any litigation or action involving any of the Asserted Patent, Related Patents, or Related Applications, including analyses or opinions related thereto, from October 1, 2012 to November 21, 2013.<sup>54</sup>

54. Documents sufficient to identify any licensing policy that You may have, including without limitation policies and practices relating to taking or granting licenses, relating to any of the Asserted Patent, Related Patents, or Related Applications.<sup>55</sup>

55. Documents and Communications concerning whether You and/or Your Licensees have complied with the marking or notice provisions of 35 U.S.C. § 287(a)<sup>56</sup> with respect to the

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made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>54</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor” and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>55</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the “licensor’s established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly”, among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>56</sup> 35 U.S.C. § 287(a) states: “Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word “patent” or the abbreviation “pat.”, together with the number of the patent, or by fixing thereon the word “patent” or the abbreviation “pat.” together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.”

Asserted Patent, including but not limited to one copy or sample of each and every Product and/or package or other material on which the patent number of the Asserted Patent has been or are marked.<sup>57</sup>

56. Documents sufficient to identify, and to show the design, operation, or functioning of, any commercially acceptable, non-infringing (potential or actual) alternative to the subject matter claimed in the Asserted Patent, after October 20, 2015.<sup>58</sup>

57. Documents sufficient to identify, and to show the design, operation, or functioning of any technically acceptable, non-infringing (potential or actual) alternative to the subject matter claimed in the Asserted Patent, after October 20, 2015.<sup>59</sup>

58. Documents sufficient to identify the nature and scope of any rights in the Asserted Patent that You have obtained and/or retained at any time, including, without limitation, any right to control litigation, future royalties, payments for licenses of the Asserted Patent, or payments relating to or resulting from the outcome of any litigation involving or relating to the Asserted Patent (including without limitation the Action).<sup>60</sup>

59. Documents and Communications exchanged with any trade associations,

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<sup>57</sup> Such materials will be relevant to defenses relating to damages, including failure to mark.

<sup>58</sup> Such materials will be relevant to defenses relating to damages, including the availability of non-infringing alternatives.

<sup>59</sup> Such materials will be relevant to defenses relating to damages, including the availability of non-infringing alternatives.

<sup>60</sup> Such materials will be relevant to issue regarding Plaintiffs standing to bring the current suit and joinder of the proper parties. Such materials will be relevant to patent exhaustion and license defenses, as well as, to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

standards setting organizations, or industry working groups, relating to the Asserted Patent, or the inventions disclosed therein, from October 1, 2012 to the present.<sup>61</sup> This includes but is not limited to:

- a. Communications with trade associations, standards setting organizations, or industry trade groups relating to the Asserted Patent, or the inventions disclosed therein;
- b. Technical and non-technical submissions to trade associations, standards setting organizations, or industry trade groups relating to the Asserted Patent, or the inventions disclosed therein;
- c. Intellectual property declarations to any trade associations, standards setting organizations, or industry trade groups relating to the Asserted Patent, or the inventions disclosed therein;
- d. Documents related to trade associations, standards setting organizations, or industry trade groups meetings (including working group meetings) where the subject matter described and/or claimed in the Asserted Patent was discussed.

60. Documents and Communications exchanged with any trade associations, standards setting organizations, or industry working groups, relating to Related Patents, Related Applications, or the inventions disclosed therein, from October 1, 2012 to the present.<sup>62</sup> This

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<sup>61</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>62</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary

includes but is not limited to:

- a. Communications with trade associations, standards setting organizations, or industry trade groups relating to Related Patents, Related Applications, or the inventions disclosed therein;
- b. Technical and non-technical submissions to trade associations, standards setting organizations, or industry trade groups relating to Related Patents, Related Applications, or the inventions disclosed therein;
- c. Intellectual property declarations to any trade associations, standards setting organizations, or industry trade groups relating to Related Patents, Related Applications, or the inventions disclosed therein;
- d. Documents related to trade associations, standards setting organizations, or industry trade groups meetings (including working group meetings) where the subject matter described and/or claimed in Related Patents was discussed.

61. Documents (including without limitation correspondence, notes, meeting minutes, proposals, statements, and other Communications) regarding what constitutes Fair Reasonable and Non-Discriminatory (“FRAND”) or Reasonable and Non-Discriminatory (“RAND”) terms relating to patent licensing in the technical space related to the subject matter of the Asserted Claims.<sup>63</sup>

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considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement).

<sup>63</sup> Such materials will be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial

62. Documents sufficient to identify all sections and/or subsection of any standard or draft standard to which You believe the Asserted Patent are essential.<sup>64</sup>

63. Documents sufficient to identify all sections and/or subsection of any standard or draft standard to which You believe the Asserted Patent is relevant to.<sup>65</sup>

64. Agreements that You have concerning patents declared essential to or any standard related to the subject matter of the Asserted Patent, such as standards maintained by the Institute of Electrical and Electronics Engineers, Internet Engineering Task Force, and the European Telecommunications Standards Institute.<sup>66</sup>

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embodiment of it as owned and produced by the licensor”; “portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>64</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>65</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>66</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to quantifying any



65. Agreements that You have concerning patents that You contend are relevant to standards related to the subject matter of the Asserted Patent, such as standards maintained by the Institute of Electrical and Electronics Engineers, Internet Engineering Task Force, and the European Telecommunications Standards Institute.<sup>67</sup>

66. Documents sufficient to identify patents of which You are aware that have been contented to be essential to, or relevant to, standards or draft standard for which the Asserted Patent has been contented to be essential to, or relevant to, such as standards maintained by the Institute of Electrical and Electronics Engineers, Internet Engineering Task Force, and the European Telecommunications Standards Institute.<sup>68</sup>

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alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>67</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

<sup>68</sup> Such materials will be relevant to determining the scope of the patents in claim construction and to defenses, such as non-infringement, and invalidity (including obviousness, secondary considerations regarding obviousness, anticipation, patent-eligibility, written description, indefiniteness, and enablement). Such materials will also be relevant to quantifying any alleged damages pursuant the *Georgia-Pacific* factors, which require consideration of the: “royalties received by the patentee”; “rates paid by the licensee for the use of other patents comparable to the patent in suit”; “established profitability of the product made under the patent”; “character of the commercial embodiment of it as owned and produced by the licensor”; and “portion of the realizable profit that should be credited to the invention”; among others things. *Georgia-Pacific*, 318 F. Supp. at 1119–20.

67. Documents sufficient to show Your past and present electronic data and Document destruction and retention policies with respect to the Documents produced in response to the above requests.

# **EXHIBIT A2**

## **ORAL EXAMINATION TOPICS REQUESTED**

Defendants Dell Technologies Inc., Dell Inc., EMC Corporation, and VMware, Inc. (collectively, “Defendants”) seek to ask questions on topics described below.

### **DEFINITIONS**

The following definitions are applicable to terms employed in responding to this request:

1. “Accused Product” or “Accused Products” shall refer to any device, product, or other thing that Plaintiff is permitted to accuse of infringing the Asserted Patent in this Action. A copy of the Complaint in case number 6:20-cv-00481-ADA is attached as Exhibit A3. In referring to any device, product, or other thing as an “Accused Product,” Defendants in no way communicate their agreement that it infringes the Asserted Patent.
2. “Action” shall refer to the above-captioned proceeding in the United States District Court for the Western District of Texas, with case number 6:20-cv-00481-ADA.
3. “Asserted Claim” shall refer to each claim of the Asserted Patent that Plaintiff contends Defendants infringe.
4. “Asserted Patent” shall refer to U.S. Patent No. 9,164,800 and any patent applications related thereto.
5. “Communication” shall mean, without limitation, any written, oral, or other transmission of information, including but not limited to emails.
6. “Complaint” shall refer to the Complaint (including exhibits) that Plaintiff filed on June 2, 2020 as docket number 1 in this Action, as may be amended.
7. “Concerning,” “refer(s) to,” “related to,” “reflecting,” and “relating to” shall mean directly or indirectly relating to, referring to, mentioning, reflecting, pertaining to, evidencing, illustrating, involving, describing, discussing, commenting on, embodying, responding to,

supporting, contradicting, or constituting (in whole or in part), as the context makes appropriate.

8. “Defendants” or “Defendant” shall refer to Dell Technologies Inc., Dell Inc., EMC Corporation, and VMware, Inc., and any and all of their then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
9. “Document” shall include, without limitation, all documents, electronically stored information, and tangible things within the scope of the Federal Rules of Civil Procedure, including Rule 34. Federal Rules of Civil Procedure 34 permits discovery of: “(A) documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things.”
10. “Employee” shall refer to any officer, director, partner, employee, representative, or agent.
11. “Licensee(s)” shall refer to any entity having a license, assignment, covenant not to sue, or other understanding, written, oral or implied, that the entity has any rights to the Asserted Patent, any Related Patents, or any Related Applications, may practice one or more claims of the Asserted Patent and/or that Plaintiff will not file suit or otherwise enforce against that entity one or more claims of the Asserted Patent or any Related Patent or Related Application.

12. “Named Inventor” shall refer to any individual who is listed as an inventor on the Asserted Patent or any Related Patent or Related Application thereof.
13. “Person” shall refer to any natural person, firm, association, partnership, government agency, corporation, proprietorship, or other entity and its officers, directors, partners, employee, representatives, and agents.
14. The terms “Plaintiff,” and/or “WSOU” shall refer to the responding Plaintiff WSOU Investments, LLC d/b/a Brazos Licensing and Development, and any and all of its then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
15. “Prior Art” encompasses, without limitation, the subject matter described in each and every subdivision of 35 U.S.C. §§ 102 and 103, and includes, but is not limited to, memoranda, notes, manuals, interviews, testing data, disclosures, prototypes, correspondence, drawings, papers, articles, patents, printed publications, public uses, demonstrations, offers for sale or license, and sales.
16. “Related Application(s)” means any and all applications related to the Asserted Patent, including any provisional or non-provisional applications, continuations, continuations-in-part, divisions, interferences, reexaminations, re-issues, parents, foreign counterpart applications, and any other applications disclosing, describing or claiming any invention disclosed, described or claimed in the Asserted Patent, or claiming the benefit of the filing date of any application whose benefit is claimed in the Asserted Patent, whether or not abandoned and whether or not issued.

17. “Related Patent(s)” means any and all U.S. or foreign patents based upon or related to any Related Application(s) or Asserted Patent, including any patents or applications that may have been opposed, reexamined, re-issued or subjected to any validity or nullity proceeding.
18. “Third Party” shall refer to any person other than Plaintiff or Defendants.
19. “You,” “Your,” “Yours” shall refer to Alcatel-Lucent India Ltd., and any and all of its then-current or prior subsidiaries, parents, affiliates, divisions, successors, predecessors, agents, employees, representatives, directors, officers, trustees, and attorneys, or any other person or entity acting in whole or in part in concert with any of the foregoing, directly or indirectly.
20. “Product(s)” means a machine, manufacture, apparatus, device, instrument, mechanism, appliance, software, service, process, or an assemblage of components/parts (either individually or collectively) that are designed to function together electronically, mechanically, or otherwise, including any offered for sale or under development.
21. Any pronouns shall be construed to refer to the masculine, feminine, or neutral gender, in singular or plural, as in each case is most appropriate.
22. The singular form of any word shall be construed to also include the plural, and vice-versa.
23. The word “each” shall be construed to mean “each and every.”
24. The words “and” and “or” shall be construed conjunctively or disjunctively, whichever makes the request more inclusive.
25. The words “any” and “all” shall be construed to mean “any and all.”

## **INSTRUCTIONS**

1. This request seeks disclosure to the full extent of the Federal Rules of Civil Procedure and shall be interpreted as inclusive rather than exclusive.
2. It is Your duty in responding to this request to designate one or more officers, directors, managing agents, or other Persons who are the most knowledgeable with respect to the topics identified below.

## **DEPOSITION TOPICS**

1. The alleged invention(s) claimed in each Asserted Claim, and the alleged benefits, advantages, disadvantages or limitations of those alleged invention(s) as compared to the state of the art at the time of filing, and the factual bases thereof.

2. The inventorship of each Asserted Claim, including identification of any individuals other than the Named Inventors who aided or participated in the conception, reduction to practice, or diligence toward reduction to practice of the subject matter of the Asserted Claims.

3. The role of each Named Inventor, as well as any individual identified pursuant to Topic No. 2, in the alleged invention of each Asserted Claim, including conception, diligence and reduction to practice, and including the subject matter to which each Person contributed, and the dates and circumstances in which each Named Inventor, as well as any individual identified pursuant to Topic No. 2, made such contributions.

4. The conception, reduction to practice, and diligence toward the reduction to practice of each Asserted Claim, and any corroboration thereof.

5. The dates and circumstances concerning any first disclosure, demonstration, sale or offer for sale of any prototype or commercial embodiment of any of the inventions claimed in



the Asserted Claims, and the identification and subject matter of any documents relating to or referring to each such activity.

6. The past and current ownership of the Asserted Patent, including its chain of title.

7. The preparation and prosecution of the applications relating to the Asserted Patent, any Related Patents, Related Applications, and patents and applications incorporated by reference into the Asserted Patent, and any certificates of correction.

8. The state of the art at the time of filing for the Asserted Patent, any Related Patents, Related Applications, and patents and applications incorporated by reference into the Asserted Patent, and Your knowledge thereof.

9. Any facts, studies, investigations, information, documents (including Prior Art), and analyses You identified, received, or knew at any time relating to the alleged validity, enforceability, infringement, valuation, or priority dates of the Asserted Patent, Related Patents, Related Applications, or patents and applications incorporated by reference into the Asserted Patent, including any Communications with third parties relating to the foregoing.

10. Any facts, studies, investigations, information, documents, and analyses regarding the structure, functions, development of, or operation of, or that constitute embodiments of, any alleged invention disclosed or claimed in the Asserted Patent, regardless of whether such embodiment was commercialized, and regardless of whether or not it worked properly.

11. Any attempts to sell or otherwise transfer financial interests in the Asserted Patent, any portfolio of patents containing the Asserted Patent, or any patents related to the subject matter of the Asserted Claims.

12. The timing and circumstances related to Your first knowledge or awareness of

any alleged infringement of the Asserted Patent by each of the Defendants.

13. Any decision to pursue or not to pursue a claim infringement of any of the claims of the Asserted Patent against any Defendant.

14. Any efforts by You, any predecessor-in-interest of the Asserted Patent, or any other Person to enforce or license the Asserted Patent, or any portfolio of patents containing the Asserted Patent, or any patents related to the subject matter of the Asserted Claims.

15. Your policies and practices concerning patent agreements (including licensing), including:

- a. any written licensing policies or best practices;
- b. any most favored Licensee;
- c. the economic and technical factors considered by You in drafting and entering into any license, royalties, standstill or settlement agreements;
- d. any standard or preferred terms for license, royalty, standstill or settlement agreements;
- e. the process by which You determine the nature, scope and terms of license agreements in which You are a licensor; and
- f. any circumstance in which You deviated from such policies.

16. Your knowledge of, and participation in, any Communications between Plaintiff and Defendants prior to the filing of the Action.

17. Any Communications related to Plaintiff, including communications related to licensing of any patents related the subject matter of the Asserted Claims, including the Asserted Patent, Related Patents, and Related Applications, compensation, license rates, royalties related thereto, agreements with Plaintiff, Defendants, the Action, the decision to file the Action,

requests or offers to provide assistance, witnesses and/or documents for use in the Lawsuit, and any discussion about standing of Plaintiff to bring the Action.

18. Your relationship with all potential Licensees, including all agreements, assurances, covenants not to sue, and understandings not to assert patents against such potential Licensees, including but not limited to Communications and agreements relating to the Asserted Patent, Related Patents or Related Applications, and the circumstances relating to such activity.

19. Your relationship with any entity associated with Stuart A. Shanus, Marc Wade, and/or Craig Etchegoyen, including without limitation Wade and Company, Orange Holdings, WSOU, and/or Uniloc USA, Inc.,<sup>1</sup> including any patent license agreements with any such entity that relate to patents or patent applications that claim subject matter related to the subject matter of the Asserted Claims.

20. Any Communication You engaged in regarding each Defendant and its respective products or services, and any analysis You performed of each Defendant and its respective products and services related to the Asserted Patent, Related Patents or Related Applications.

21. Any valuations of the Asserted Patent or any portfolio of patents that includes the Asserted Patent.

22. Any licenses, assignments, conveyances, security interests, or other agreements relating to the Asserted Patent, or any portfolio of patents that includes or included the Asserted Patent, and negotiations leading to and circumstances surrounding such agreement.

23. Any revenues and profits received by You for any products practicing the alleged invention of the Asserted Patent.

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<sup>1</sup> Stuart A. Shanus and Craig Etchegoyen are the Chairman and President of WSOU. Mark Wade, Wade and Company, Orange Holdings, and/or Uniloc USA, Inc. are all related persons or entities of WSOU.

24. Revenues, costs, expenses, and profits (including gross and net profits) generated in connection with Your ownership of, the Asserted Patent, and the methodology used to calculate or otherwise determine revenues, costs, expenses, and/or profits.

25. Any licensing fees and rates paid to You for each portfolio that includes the Asserted Patent.

26. The rates paid by any Licensee to You for the use of other patents comparable to the Asserted Patent.

27. Any financial interests that You may have in the Asserted Patent, including but not limited to royalties and the outcome of the Action.

28. Any facts, studies, investigations, and analyses relating to any submission of intellectual property right declarations with respect to the Asserted Patent to any standard maintained by an international and/or domestic trade association or standards setting organization, including all analyses or opinions related thereto.

29. Any facts, studies, investigations, and analyses relating to any alleged essentiality of the Asserted Patent to any industry standard, including any Communications with third parties relating to the foregoing.

30. Any investigation of the standards activity and intellectual property right disclosures of any predecessor-in-interest to the Asserted Patent, including any investigation by You into the intellectual property right policies, Fair Reasonable and Non-Discriminatory (“FRAND”) obligations, or Reasonable and Non-Discriminatory (“RAND”) terms relating to patent licensing in the technical space related to the subject matter of the Asserted Claims.

31. The role of You and/or any prior owner of the Asserted Patent, or any affiliates of You, or a prior owner of the Asserted Patent, in any standards setting organization from

October 25, 2012 to present.

32. Any Communications that You, any predecessor-in-interest of the Asserted Patent, and/or any Named Inventors had with an international and/or domestic trade association or standards setting organizations regarding the subject matter of the Asserted Claims.

33. Any disclosures made by or on behalf of You or any predecessor-in-interest of the Asserted Patent to an international and/or domestic trade association or standards setting organization regarding the existence and/or potential standard essentiality of the Asserted Patent, Related Patents, or Related Applications.

34. Your knowledge of, and compliance with, intellectual property right policies of an international and/or domestic trade association or standards setting organization related to the subject matter of the Asserted Claims.

35. Your knowledge of, and compliance with, FRAND and/or RAND obligations, including without limitation any policies, guidelines, or instructions, and any related analysis or discussions.

36. Your collection, retention and production of documents and information relevant to the Action, including but not limited to:

- a. Your production of documents and information to Defendants, either directly or indirectly through Plaintiff;
- b. Your efforts to identify, locate and gather documents for production, including identification of custodians;
- c. the storage types and physical location of relevant data;
- d. a description of all sources containing the information which has been produced by You, including custodians thereof; and

- e. all databases and email systems containing information or documents relevant to the Action and produced, referenced, created or used through the present, and operation of such systems or databases, including ability to search, storage, retrieving, backup, archiving, cataloguing, and the identity of Persons responsible for administering those databases and/or email systems.

37. The subject matter and content of all Documents and Communications identified and/or produced in response to the above requests.

38. The authenticity of all Documents identified in response to the requests for production.

39. All Documents reviewed by You in connection with the deposition on these topics.

40. For each of the topics set forth in this request, the identity and location of Your employee, agent, representative, independent contractor, or other partner, affiliate, or business associate, with the most knowledge concerning that topic.

# **EXHIBIT A3**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

WSOU INVESTMENTS, LLC d/b/a  
BRAZOS LICENSING AND  
DEVELOPMENT,

Plaintiff,

V.

DELL TECHNOLOGIES INC., DELL  
INC., EMC CORPORATION, AND  
VMWARE, INC.

Defendants.

§ § § § § § § § § § § § § § § §

NO. 6:20-cv-481-ADA

## JURY TRIAL DEMANDED

# FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff WSOU Investments, LLC d/b/a Brazos Licensing and Development (“Brazos” or “Plaintiff”), by and through its attorneys, files this First Amended Complaint (“Amended Complaint” or “Complaint”) for Patent Infringement against Dell Technologies Inc., Dell Inc., EMC Corporation, and VMWare, Inc. (collectively, “Defendants”) and alleges:

## NATURE OF THE ACTION

1. This is a civil action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. §§ 1, et seq., including §§ 271, 281, 284, and 285.

## THE PARTIES

2. Brazos is a limited liability corporation organized and existing under the laws of Delaware, with its principal place of business at 605 Austin Avenue, Suite 6, Waco, Texas 76701.

3. On information and belief, defendant Dell Technologies Inc. (“Dell”) is a Delaware corporation with a principal place of business at One Dell Way, Round Rock, Texas 78682.



4. On information and belief, defendant Dell Inc. is a Delaware corporation with a principal place of business at One Dell Way, Round Rock, Texas 78682. Dell Inc. is wholly owned by its corporate parent, Dell.

5. On information and belief, defendant EMC Corporation (“EMC”) is a Massachusetts corporation with a principal place of business at One Dell Way, Round Rock, Texas 78682. EMC Corporation is wholly owned by its corporate parent, Dell Technologies Inc.

6. Upon information and belief, VMware, Inc. (“VMWare”) is a Delaware corporation with two established places of business in this District, including two in Austin, Texas with over 700 employees.

7. Upon information and belief, VMWare was acquired by EMC in 2004 and conducted an initial public offering of Class A common stock in August 2007. On or around September 2016, Dell acquired by EMC. As a result, EMC became a wholly-owned subsidiary of Dell, and VMWare became an indirectly-held, majority-owned subsidiary of Dell. Under the rules of the New York Stock Exchange, VMWare is a controlled company. As of January 31, 2020, Dell controlled approximately 80.9% of VMWare’s outstanding common stock, including 31 million shares of its Class A common stock and all of its Class B common stock.

**COUNT ONE - INFRINGEMENT OF**  
**U.S. PATENT NO. 9,164,800**

8. Brazos re-alleges and incorporates by reference the preceding paragraphs of this Complaint.

9. On October 20, 2015, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 9,164,800 (“the ‘800 Patent”), entitled “Optimizing Latencies in

Cloud Systems by Intelligent Compute Node Placement.” A true and correct copy of the ‘800 Patent is attached as Exhibit A to this Complaint.

10. Brazos is the owner of all rights, title, and interest in and to the ‘800 Patent, including the right to assert all causes of action arising under the ‘800 Patent and the right to any remedies for the infringement of the ‘800 Patent.

11. Defendants make, use, sell, offer for sale, import, and/or distribute in the United States, including within this judicial district, products such as, but not limited to, cloud-related solutions, including but not limited to, devices incorporating VMware’s VeloCloud solutions and vSphere software, such as Dell’s PowerEdge servers and VxRail appliances (collectively, the “Accused Products”).

The advertisement is a rectangular banner with a dark blue header and a white body. The header contains the text "Get what it takes to build your VMware cloud." in white, followed by "Accelerate your timeframe for success with a complete VMware cloud solution from Dell." and a "Contact Dell >" link. To the right of the text is a white icon of a server rack inside a cloud, with several smaller white clouds floating around it. The body of the advertisement is white and contains the heading "Benefit from an experienced cloud partnership" in bold. Below this heading is a paragraph of text: "The success of your cloud initiatives may ride on the experience of your cloud solution provider. Choose a partner that provides mature, integrated joint-solutions, including VMware technology and Dell servers, storage, networking, software and services." To the right of this paragraph is a blue box with the text "Contact a Dell expert" in white, followed by "Transform your data center from infrastructure-centric to service-centric." and a "Contact Now >" link.

Get what it takes to build your VMware cloud.

Accelerate your timeframe for success with a complete VMware cloud solution from Dell.

Contact Dell >

**Benefit from an experienced cloud partnership**

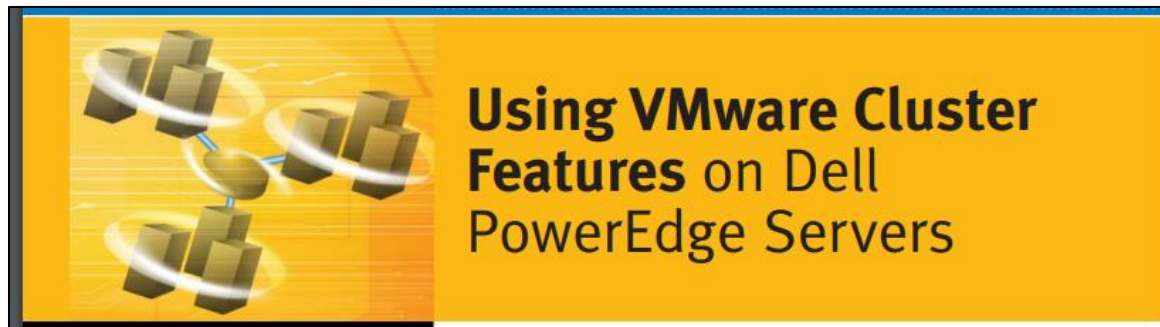
The success of your cloud initiatives may ride on the experience of your cloud solution provider. Choose a partner that provides mature, integrated joint-solutions, including VMware technology and Dell servers, storage, networking, software and services.

**Contact a Dell expert**

Transform your data center from infrastructure-centric to service-centric.

Contact Now >

<https://www.dell.com/learn/us/en/15/solutions/vmware-vcloud>



<https://www.dell.com/downloads/global/power/ps3q07-20070562-hanson.pdf>

**Simplify your journey to the hybrid cloud.**

Together, Dell EMC and VMware accelerate digital business in a multi-cloud world. Building on our solid partnership, Dell EMC PowerEdge will offer the latest versions of VMware vSphere®, VMware vSAN™ and VMware Cloud Foundation once available. Learn more about VMware's recent announcements [here](#).

<https://www.delltechnologies.com/en-us/solutions/vmware/servers-for-vmware.htm>

The two-socket server is an ideal base for building V13 clusters as there are not as many "eggs in one basket". However, it would be best if there were a mechanism to restart the virtual machines from the failed hosts on remaining hosts in the VMware farm. Using VMware's HA (High Availability) and DRS (Distributed Resource Scheduler) it is possible to obtain this functionality.

VMware HA allows virtual machines on failed ESX server hosts to restart on surviving ESX hosts. The DRS solution uses system algorithms and user created rules to determine the optimal placement of the virtual machines.

[https://www.dell.com/downloads/global/vectors/dell\\_and\\_vmware\\_drs\\_ha\\_solutions.pdf](https://www.dell.com/downloads/global/vectors/dell_and_vmware_drs_ha_solutions.pdf)

### 3 VxRail appliances

VxRail is jointly developed by Dell EMC and VMware and is the only fully integrated, preconfigured, and tested HCI appliance that is powered by VMware Virtual SAN (vSAN). VxRail is managed through the vCenter Server interface. It provides a familiar vSphere experience and enables streamlined deployment and the ability to extend the use of existing IT tools and processes.

VxRail appliances are managed using VxRail HCI System software for hardware and appliance maintenance tasks as well as software life cycle management. VxRail HCI System Software incorporates Secure Remote Services (SRS) and other serviceability capabilities. VxRail appliances are discoverable and visible in Dell EMC Vision™ Intelligent Operations.

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**Note:** For day-to-day VM management, you manage the VMware stack on the VxRail appliance directly through vCenter server.

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The VxRail software bundle is preloaded and licensed onto hardware and consists of the following components (specific software versions not shown):

- VxRail HCI System Software
- VMware vCenter Server
- VMware vRealize Log Insight™
- VMware vSAN™
- Dell Secure Remote Services (SRS)/VE

Also preloaded is VMware vSphere®; however, licenses are required and can be purchased through Dell EMC, VMware, or your preferred VMware reseller partner.

<https://www.dell EMC.com/resources/en-us/asset/technical-guides-support-information/products/converged-infrastructure/vxrail-vcenter-server-planning-guide.pdf>

12. The Accused Products allow administration of hybrid cloud environments and provide resource management.

VMware vSphere is VMware's virtualization platform, which transforms data centers into aggregated computing infrastructures that include CPU, storage, and networking resources. vSphere manages these infrastructures as a unified operating environment, and provides you with the tools to administer the data centers that participate in that environment.

<https://docs.vmware.com/en/VMware-vSphere/index.html>

## Introduction

VMware vSphere® 6.7 delivers key capabilities to enable IT organizations to address the following notable trends that are putting new demands on their IT infrastructure:

- Explosive growth in quantity and variety of applications, from business-critical applications to new intelligent workloads
- Rapid increase in hybrid cloud environments and use cases
- Global expansion of on-premises data centers, including at the edge
- Heightened importance of security relating to infrastructure and applications

The following sections discuss some of the key capabilities in vSphere 6.7 that address the aforementioned trends.

<https://www.vmware.com/content/dam/digitalmarketing/vmware/en/pdf/products/vsphere/vmware-whats-new-in-vsphere-whitepaper.pdf>

vSphere Resource Management describes resource management for VMware® ESXi and vCenter® Server environments.

This documentation focuses on the following topics.

- Resource allocation and resource management concepts
- Virtual machine attributes and admission control
- Resource pools and how to manage them
- Clusters, vSphere® Distributed Resource Scheduler (DRS), vSphere Distributed Power Management (DPM), and how to work with them
- Datastore clusters, Storage DRS, Storage I/O Control, and how to work with them
- Advanced resource management options
- Performance considerations

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

13. The Accused Products employ Distributed Resources Scheduler (DRS) solutions to manage workloads and group hosts to resource clusters in order to segregate the computing needs of different business units and balance workloads.

### Enable VMware DRS to Manage Workloads

Group VMware ESXi hosts into resource clusters to segregate the computing needs of different business units. VMware vSphere clusters allow you to:

- Provide highly available resources to your workloads.
- Balance workloads for optimal performance.
- Scale and manage computing resources without service disruption.

<https://www.vmware.com/in/products/vsphere/drs-dpm.html>

14. The Accused Products allocate I/O resources to virtual machines (VMs) performing computing based on importance by assigning a relative number of shares to the virtual machines. A storage DRS solution in the Accused Products can provide placement of VMs and VM disks (VMDKs) for data storage, for example.

### Set Storage I/O Control Resource Shares and Limits

Allocate storage I/O resources to virtual machines based on importance by assigning a relative amount of shares to the virtual machine.

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

15. The Accused Products uses clusters to manage the resources. In vSphere clusters, vSphere High Availability (HA) and vSphere Distributed Resources Scheduler (DRS) solutions



are also enabled.

## Create a Cluster

A cluster is a group of hosts. When a host is added to a cluster, the host's resources become part of the cluster's resources. The cluster manages the resources of all hosts within it. Clusters enable the vSphere High Availability (HA) and vSphere Distributed Resource Scheduler (DRS) solutions.

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

16. A DRS cluster created by a vSphere Client may be a collection of hosts and associated virtual machines with shared resources and a shared management interface. A vSphere Client can add multiple hosts to a cluster. A Datastore Cluster is a group of datastores. A vCenter server can manage all these resources.

A cluster is a group of hosts. You can create a cluster using vSphere Client, and add multiple hosts to the cluster. vCenter Server manages these hosts' resources jointly: the cluster owns all of the CPU and memory of all hosts. You can enable the cluster for joint load balancing or failover. See [Chapter 11 Creating a DRS Cluster](#) for more information.

A datastore cluster is a group of datastores. Like DRS clusters, you can create a datastore cluster using the vSphere Client, and add multiple datastores to the cluster. vCenter Server manages the datastore resources jointly. You can enable Storage DRS to balance I/O load and space utilization. See [Chapter 13 Creating a Datastore Cluster](#).

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

17. A vSphere cluster contains VMs, datastores, and links between them.

Storage DRS allows you to manage the aggregated resources of a datastore cluster. When Storage DRS is enabled, it provides recommendations for virtual machine disk placement and migration to balance space and I/O resources across the datastores in the datastore cluster.

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

18. Storage DRS in the Accused Products allows users to manage the aggregated resources in a datastore cluster to achieve objectives, including space load balancing, I/O load balancing, and placement for virtual disks.

When you enable Storage DRS, you enable the following functions.

- Space load balancing among datastores within a datastore cluster.
- I/O load balancing among datastores within a datastore cluster.
- Initial placement for virtual disks based on space and I/O workload.

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

Virtual machine (VM) provisioning operations such as create, clone, and relocate involve the placement of storage resources. Storage DRS (sometimes seen as “SDRS”) is the resource management component in vSphere responsible for optimal storage placement and load balancing recommendations in the datastore cluster.

A key contributor to VM provisioning times in Storage DRS-enabled environments is the time it takes (latency) to receive placement recommendations for the VM disks (VMDKs). This latency particularly comes into play when multiple VM provisioning requests are issued concurrently.

Several changes were made in vSphere 6.7 to improve the time to generate placement recommendations for provisioning operations. Specifically, the level of parallelism was improved for the case where there are no storage reservations for VMDKs. This resulted in significant improvements in recommendation times when there are concurrent provisioning requests.

<https://blogs.vmware.com/performance/2018/11/sdrs-performance-vsphere67.html>

19. Storage DRS in the Accused Products place VMs and VMDKs with reduced latency. Dell claims that significant improvement in the latency is observed in the new version of vSphere, i.e., VMware vSphere 6.7.



Virtual machine (VM) provisioning operations such as create, clone, and relocate involve the placement of storage resources. **Storage DRS** (sometimes seen as “SDRS”) is the resource management component in vSphere responsible for optimal storage placement and load balancing recommendations in the datastore cluster.

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<https://blogs.vmware.com/performance/2018/11/sdrs-performance-vsphere67.html>

20. In the Accused Products, the Storage DRS works in conjunction with the cluster DRS based on a variety of metrics, including device latency and prioritizations, to avoid over provisioning storage and other resources. As an example of an assignment objective, the Storage DRS allocates resources (*e.g.*, the placement for VMs and VMDKs) using a variety of metrics (*e.g.*, latency), which may each be controlled and/or monitored. In addition, resources can be adjusted and can be set (*e.g.*, as per virtual machines) through application of assignment algorithms (*e.g.*, VMotion).

### Important VM Level Metrics

- CPU active (run, ready and peak)
- Memory overhead (growth rate)
- Active, Consumed and Idle Memory
- Shared memory pages, balloon, swapped

The most important metric to determine a virtual machines' CPU demand is CPU active. CPU active is a collection of multiple stats all morphed into a single stat. One important statistic that is a part of CPU active is CPU ready time. DRS takes ready time into account to understand the demand of the virtual machine. On top of this, DRS considers both peak active as average active in the past five minutes.

The most important metric to determine a virtual machines' memory demand is the active memory and the consumed memory. Another metric that is considered is the page sharing between multiple virtual machines running on the same host, whenever DRS makes a decision it knows about how pages are being shared between their respective virtual machines on that particular host. If a virtual machine is moved away from this host, DRS takes into account the loss of page sharing. This is one of the main reasons, why DRS prefers to move medium-sized workloads over larger sized workloads. Moving a virtual machine to a destination could force the ESXi host to reclaim memory to make room for the in-transit virtual machine. But there is one metric that supersedes all metrics listed above, and that is virtual machine happiness.

<https://vspherecentral.vmware.com/t/resource-management-and-availability/vsphere-resources-and-availability/drs-decision-engine/>

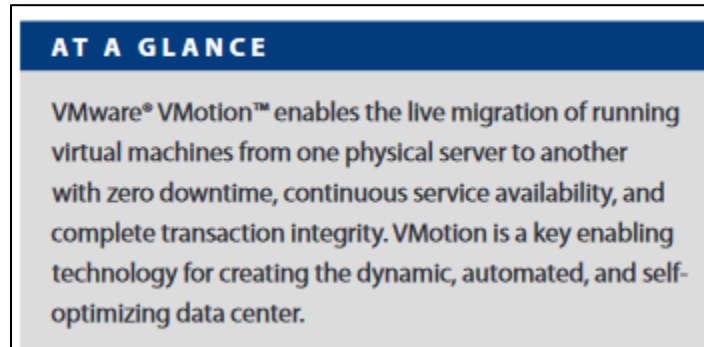
vSphere Storage I/O Control allows cluster-wide storage I/O prioritization, which allows better workload consolidation and helps reduce extra costs associated with over provisioning.

Storage I/O Control extends the constructs of shares and limits to handle storage I/O resources. You can control the amount of storage I/O that is allocated to virtual machines during periods of I/O congestion, which ensures that more important virtual machines get preference over less important virtual machines for I/O resource allocation.

When you enable Storage I/O Control on a datastore, ESXi begins to monitor the device latency that hosts observe when communicating with that datastore. When device latency exceeds a threshold, the datastore is considered to be congested and each virtual machine that accesses that datastore is allocated I/O resources in proportion to their shares. You set shares per virtual machine. You can adjust the number for each based on need.

<https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>

21. Based on the metrics and prioritizations, algorithms applied in the Accused Products (*e.g.*, VMotion) can create assignments to migrate and optimize resources.



[https://www.vmware.com/pdf/vmotion\\_datasheet.pdf](https://www.vmware.com/pdf/vmotion_datasheet.pdf)

22. In view of preceding paragraphs, each and every element of at least claim 1 of the ‘800 Patent is found in the Accused Products.

23. Upon information and belief, each and every element of at least claim 1 of the patent-in-suit is performed or practiced by Defendants at least through Defendants’ own use and configuration of its own Accused Products, and/or through Defendants’ own testing and configuration of its own Accused Products, and/or through Defendants’ providing services for its Accused Products, including but not limited to providing installation, deployment, support and configuration of its Accused Products.

24. Defendants continue to directly infringe at least one claim of the ‘800 Patent, literally or under the doctrine of equivalents, by making, using, selling, offering for sale, importing, and/or distributing the Accused Products in the United States, including within this judicial district, without the authority of Brazos.

25. In May 2020, Brazos filed a suit against Defendants asserting infringement of the same patent and by the same accused products that are asserted in this case. Brazos dismissed the prior suit before filing this suit. As a result of the prior suit, Defendants had notice and actual

or constructive knowledge of their infringement of the patent-in-suit since at least May 2020, before the filing of this case. Further, Defendants had knowledge of their infringement of the patent-in-suit before the filing of this Amended Complaint.<sup>1</sup>

26. Since at least May 2020, through its actions, Defendants have actively induced product makers, distributors, retailers, and/or end users of the Accused Products to infringe the ‘800 Patent throughout the United States, including within this judicial district, by, among other things, advertising and promoting the use of the Accused Products in various websites, including providing and disseminating product descriptions, operating manuals, and other instructions on how to implement and configure the Accused Products. Examples of such advertising, promoting, and/or instructing include the documents at:

- <https://www.dell.com/learn/us/en/15/solutions/vmware-vcloud>

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<sup>1</sup> Dell filed a motion to dismiss that is mooted by this amended complaint. Dell’s motion cites a WDTX case (which relies authority from the District of Delaware) for the proposition that knowledge of a plaintiff’s patent after the lawsuit was filed is insufficient to plead the requisite knowledge for indirect infringement. *See Aguirre v. Powerchute Sports, LLC*, No. SA-10-CV-0702 XR, 2011 WL 2471299, at \*3 (W.D. Tex. June 17, 2011) (citing *Xpoint Techs. v. Microsoft Corp.*, 730 F.Supp.2d 349 (D. Del. 2010)). Several Delaware courts have since rejected this rule because there is no statutory basis to support it and because there is no purpose served by the formality of requiring the plaintiff to file an amended complaint in order to be allowed to assert knowledge of the patents during the period following the filing of the original complaint. *See Walker Digital, LLC v. Facebook, Inc.*, 852 F. Supp. 2d 559, 566 (D. Del. 2012) (“The court acknowledges that this result is inconsistent with its prior decisions in *Xpoint Techs. v. Microsoft Corp.*, 730 F.Supp.2d 349 (D.Del.2010), and *EON Corp. IP Holdings LLC v. FLO TV Inc.*, 802 F.Supp.2d 527 (D. Del. 2011). Given the ease of amendment, the limitation of damages to post-knowledge conduct, and in the interests of judicial economy, the court finds that the better reasoning is to allow a complaint that satisfies Rule 8 to proceed to discovery rather than dismissing it for lack of pre-filing knowledge when, by the time the motion to dismiss has been filed, defendant in fact has the requisite knowledge as pled by plaintiff.”); *see also IOENGINE, LLC v. PayPal Holdings, Inc.*, CV 18-452-WCB, 2019 WL 330515, at \*4 (D. Del. Jan. 25, 2019) (“The Court sees no purpose that would be served by the formality of requiring IOENGINE to file an amended complaint in order to be allowed to assert knowledge of the patents during the period following the filing of the original complaint.”).

- <https://www.dell.com/downloads/global/power/ps3q07-20070562-hanson.pdf>
- <https://www.delltechnologies.com/en-us/solutions/vmware/servers-for-vmware.htm>
- [https://www.dell.com/downloads/global/vectors/dell\\_and\\_vmware\\_drs\\_ha\\_solutions.pdf](https://www.dell.com/downloads/global/vectors/dell_and_vmware_drs_ha_solutions.pdf)
- <https://www.dell.com/support/article/en-uk/sln314727/dell-s-customization-of-vmware-esxi-and-its-advantages?lang=en>
- <https://www.dell.com/en-us/work/shop/povw/vmware-vsphere>
- <https://docs.vmware.com/en/VMware-vSphere/index.html>
- <https://www.vmware.com/content/dam/digitalmarketing/vmware/en/pdf/products/vsphere/vmware-whats-new-in-vsphere-whitepaper.pdf>
- <https://docs.vmware.com/en/VMware-vSphere/6.7/vsphere-esxi-vcenter-server-67-resource-management-guide.pdf>
- <https://www.vmware.com/in/products/vsphere/drs-dpm.html>
- <https://blogs.vmware.com/performance/2018/11/sdrs-performance-vsphere67.html>
- [https://www.vmware.com/pdf/vmotion\\_datasheet.pdf](https://www.vmware.com/pdf/vmotion_datasheet.pdf)
- <https://vspherecentral.vmware.com/t/vsphere-resources-and-availability/drs-decision-engine/>

27. Since at least May 2020, through its actions, Defendants have contributed to the infringement of the ‘800 Patent by having others sell, offer for sale, or use the Accused Products throughout the United States, including within this judicial district, with knowledge that the Accused Products infringe the ‘800 Patent. The Accused Products are especially made or adapted for infringing the ‘800 Patent and have no substantial non-infringing use. For example, in view of the preceding paragraphs, the Accused Products contain functionality which is material to at least one claim of the ‘800 Patent.

**JURY DEMAND**

Brazos hereby demands a jury on all issues so triable.

**REQUEST FOR RELIEF**

WHEREFORE, Brazos respectfully requests that the Court:

- (A) Enter judgment that Defendants infringe one or more claims of the '800 Patent literally and/or under the doctrine of equivalents;
- (B) Enter judgment that Defendants have induced infringement and continue to induce infringement of one or more claims of the '800 Patent;
- (C) Enter judgment that Defendants have contributed to and continue to contribute to the infringement of one or more claims of the '800 Patent;
- (D) Award Brazos damages, to be paid by Defendants in an amount adequate to compensate Brazos for such damages, together with pre-judgment and post-judgment interest for the infringement by Defendants of the '800 Patent through the date such judgment is entered in accordance with 35 U.S.C. § 284, and increase such award by up to three times the amount found or assessed in accordance with 35 U.S.C. § 284;
- (E) Declare this case exceptional pursuant to 35 U.S.C. § 285; and
- (F) Award Brazos its costs, disbursements, attorneys' fees, and such further and additional relief as is deemed appropriate by this Court.

Dated: October 19, 2020

Respectfully submitted,

/s/ James L. Etheridge

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**COUNSEL FOR PLAINTIFF**

# **EXHIBIT A4**



UNITED STATES DISTRICT COURT  
Western District of Texas  
WACO DIVISION

WSOU INVESTMENTS LLC

vs.

DELL TECHNOLOGIES INC., DELL INC.,  
EMC CORPORATION, VMWARE, INC.

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NO: WA:20-CV-00481-ADA

**ORDER GOVERNING PROCEEDINGS – PATENT CASE**

This Order shall govern proceedings in this case. The following deadlines are hereby set:

This case is SET for a telephonic Rule 16 Case Management Conference on Wednesday, October 21, 2020 at 1:30 p.m. Participants shall dial into the following number 5 minutes before the scheduled time: **866.434.5269; access code 967-8090**. Lead counsel for each party, and all unrepresented parties, shall be present. Client representatives are welcome to attend, but such attendance is not required. In person attendance is permitted, but not required. Anyone planning to attend in person should so inform the Court by contacting chambers not later than two court days before the scheduled hearing so the Court can evaluate whether to hold the conference in the courtroom, or in chambers. The Court expects the parties to be prepared to discuss:

- a. an overview of the claims and defenses, including any unique issues the parties believe should be addressed at this stage of the case;
  - b. issues involving the case schedule and potential amendments to the Court's default scheduling order, including the date for the *Markman* Hearing;
  - c. issues relating to claim construction, including whether a live tutorial would be of benefit to the Court;
  - d. issues relating to discovery, including potential amendments to the Court's default discovery limits or Protective Order; and,
  - e. any other issues the parties believe would lead to the just, speedy and inexpensive determination of this action.
2. (Not later than 7 days before the CMC). Plaintiff shall serve preliminary infringement contentions in the form of a chart setting forth where in the accused product(s) each element of the asserted claims(s) are found. Plaintiff shall also identify the priority date (*i.e.*

the earliest date of invention) for each asserted claim and produce: (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.

3. (Not later than 3 business days before the CMC). Lead counsel for each party shall meet and confer (either in person or by telephone), to discuss whether they believe the Court's default Scheduling Order and default Discovery Limits are appropriate for this case, and any issues relating to the management of this case they intend to raise at the CMC.
4. (Two weeks after the CMC). The Parties shall submit an agreed Scheduling Order. If the parties cannot agree, the parties shall submit a separate Joint Motion for entry of each Order briefly setting forth their respective positions on items where they cannot agree. Absent agreement of the parties, the Plaintiff shall be responsible for the timely submission of this and other Joint filings.
5. (Two weeks after the CMC). Deadline for Motions to Transfer. The Court also adopts the following page limits and briefing schedule for Motions to Transfer:
  - a. Opening – 15 pages
  - b. Response – 15 pages, due 14 days after the Opening brief
  - c. Reply – 5 pages, due 7 days after the Response brief
6. (Seven weeks after the CMC). Defendant shall serve preliminary invalidity contentions in the form of (1) a chart setting forth where in the prior art references each element of the asserted claim(s) are found, (2) an identification of any limitations the Defendant contends are indefinite or lack written description under section 112, and (3) an identification of any claims the Defendant contends are directed to ineligible subject matter under section 101. Defendant shall also produce (1) all prior art referenced in the invalidity contentions, (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s), and (3) summary, annual sales information for the accused product(s) for the two years preceding the filing of the Complaint,<sup>1</sup> unless the parties agree to some other timeframe.

### **DISCOVERY**

Except with regard to venue, jurisdictional, and claim construction-related discovery, all other discovery is stayed until after the *Markman* hearing. Notwithstanding this general stay of discovery, the Court will permit limited discovery by agreement of the parties, or upon request, where exceptional circumstances warrant. For example, if discovery outside the United States is contemplated, the Court will be inclined to allow such discovery to commence before the *Markman* hearing.

<sup>1</sup> With regard to expired patents, the sales information shall be provided for the two years preceding expiration.

With respect to venue and jurisdictional discovery, the Court generally grants leave for the parties to conduct targeted discovery (including, but not limited to requests for production, interrogatories, and depositions) with regard to motions to transfer venue or motions to dismiss based on lack of jurisdiction. If the parties disagree as to what reasonable discovery limits are, the Court encourages the parties to contact the Court to request a telephonic discovery hearing.

Following the *Markman* hearing, the following discovery limits will apply to this case. The Court will consider reasonable requests to adjust these limits should circumstances warrant.

1. Interrogatories: 30 per side<sup>2</sup>
2. Requests for Admission: 45 per side
3. Requests for Production: 75 per side
4. Fact Depositions: 70 hours per side (for both party and non-party witnesses combined)
5. Expert Depositions: 7 hours per report<sup>3</sup>

**Electronically Stored Information.** As a preliminary matter, the Court will not require general search and production of email or other electronically stored information (ESI), absent a showing of good cause. If a party believes targeted email/ESI discovery is necessary, it shall propose a procedure identifying custodians and search terms it believes the opposing party should search. The opposing party can oppose, or propose an alternate plan. If the parties cannot agree, they shall contact chambers to schedule a call with the Court to discuss their respective positions.

### **DISCOVERY DISPUTES**

A party may not file a Motion to Compel discovery unless: (1) lead counsel have met and conferred in good faith to try to resolve the dispute, and (2) the party has contacted the Court's law clerk (with opposing counsel) to arrange a telephone conference with the Court to summarize the dispute and the parties respective positions. After hearing from the parties, the Court will determine if further briefing is required.

### **PROTECTIVE ORDER**

Pending entry of the final Protective Order, the Court issues the following interim Protective Order to govern the disclosure of confidential information in this matter:

If any document or information produced in this matter is deemed confidential by the producing party and if the Court has not entered a protective order, until a protective order is issued by the Court, the document shall be marked "confidential" or with some

<sup>2</sup> A "side" shall mean the plaintiff (or related plaintiffs suing together) on the one hand, and the defendant (or related defendants sued together) on the other hand. In the event that the Court consolidates related cases for pretrial purposes, with regard to calculating limits imposed by this Order, a "side" shall be interpreted as if the cases were proceeding individually. For example, in consolidated cases the plaintiff may serve up to 30 interrogatories on each defendant, and each defendant may serve up to 30 interrogatories on the plaintiff.

<sup>3</sup> For example, if a single technical expert submits reports on both infringement and invalidity, he or she may be deposed for up to 14 hours in total.

other confidential designation (such as “Confidential – Outside Attorneys Eyes Only”) by the disclosing party and disclosure of the confidential document or information shall be limited to each party’s outside attorney(s) of record and the employees of such outside attorney(s).

If a party is not represented by an outside attorney, disclosure of the confidential document or information shall be limited to one designated “in house” attorney, whose identity and job functions shall be disclosed to the producing party 5 days prior to any such disclosure, in order to permit any motion for protective order or other relief regarding such disclosure. The person(s) to whom disclosure of a confidential document or information is made under this local rule shall keep it confidential and use it only for purposes of litigating the case.

### **CLAIM CONSTRUCTION ISSUES**

**Terms for Construction.** Based on the Court’s experience, the Court believes that it should have presumed limits on the number of claim terms to be construed. The “presumed limit” is the maximum number of terms that the parties may request the Court to construe without further leave of Court. If the Court grants leave for the additional terms to be construed, depending on the complexity and number of terms, the Court may split the Markman hearing into two hearings.

The presumed limits based on the number of patents-in-suit are as follows:

#### **Limits for Number of Claim Terms to be Construed**

<b>1-2 Patents</b>	<b>3-5 Patents</b>	<b>More than 5 Patents</b>
10 terms	12 terms	15 terms

When the parties submit their joint claim construction statement, in addition to the term and the parties’ proposed constructions, the parties should indicate which party or side proposed that term, or if that was a joint proposal.

**Claim Construction Briefing.** The Court will require simultaneous claim construction briefing with the following default page limits; however, where exceptional circumstances warrant, the Court will consider reasonable requests to adjust these limits. These page limits shall also apply collectively for consolidated cases; however, the Court will consider reasonable requests to adjust page limits in consolidated cases where circumstances warrant. In addition, the Court is very familiar with the law of claim construction and encourages the parties to forego lengthy recitations of the underlying legal authorities and instead focus on the substantive issues unique to each case.

Unless otherwise agreed by the parties, all simultaneous filings will take place at 5:00 p.m. CT.

**Page Limits for Markman Briefs**

<b>Brief</b>	<b>1-2 Patents</b>	<b>3-5 Patents</b>	<b>More than 5 Patents</b>
Opening	20 pages	30 pages	30 pages, plus 5 additional pages for each patent over 5 up to a maximum of 45 pages
Response	20 pages	30 pages	30 pages, plus 5 additional pages for each patent over 5 up to a maximum of 45 pages
Reply	10 pages	15 pages	15 pages, plus 2 additional pages for each patent over 5 up to a maximum of 21 pages

**Conduct of the Markman Hearing.**

The Court generally sets aside one half day for the *Markman* hearing; however, the Court is open to reserving more or less time, depending on the complexity of the case and input from the parties. The Court requires submission of technology tutorials in advance of the *Markman* hearing when they may be of benefit. The parties may submit tutorials in electronic form not later than one week before the *Markman* hearing and the Court encourages the parties to aim for tutorials with voiceovers in the 15 minute range. If a party intends to present a live tutorial, the parties should contact the Court to set-up a Zoom or telephonic tutorial to occur at least a week before the *Markman* hearing. In general, tutorials should be: (1) directed to the underlying technology (rather than argument related to infringement or validity), and (2) limited to 15 minutes per side. For the Court's convenience, the tutorial may be recorded, but will not be part of the record. Parties may not rely on or cite to the tutorial in other aspects of the litigation.

The Court will consider the parties suggestions on the order of argument at the *Markman* hearing. However, if the parties do not suggest a different procedure, the Court will allow the Plaintiff to pick the first term and then alternate by term. As a general rule, if one side proposes "plain and ordinary meaning" as its construction or asserts that a term is indefinite, the other party shall go first.

**GENERALISSUES**

1. The Court does not have a limit on the number of motions for summary judgment (MSJs); however, absent leave of Court, the cumulative page limit for Opening Briefs for all MSJs is 40 pages per side.

2. There may be instances where the submission of substantive briefs via audio file will be of help to the Court. If a party is contemplating submitting a brief via audio file it should contact the Court for guidance on whether it would be helpful to the Court. However, the Court has determined that audio recordings of *Markman* briefs are of limited value and those need not be submitted. The recordings shall be made in a neutral fashion, shall be verbatim transcriptions without additional colloquy (except that citations and legal authority sections need not be included), and each such file shall be served on opposing counsel. The Court does not have a preference for the manner of recording and has found automated software recordings, as well as attorney recordings, to be more than satisfactory. Audio files shall be submitted via USB drive, Box (not another cloud storage), or email to the law clerk (with a cc to opposing counsel) and should be submitted in mp3 format.
3. The Court will entertain reasonable requests to streamline the case schedule and discovery and encourages the parties to contact the Court's law clerk (with opposing counsel) to arrange a call with the Court when such interaction might help streamline the case.
4. The Court is generally willing to extend the response to the Complaint up to 45 days if agreed by the parties. However, longer extensions are disfavored and will require good cause.
5. For *Markman* briefs, summary judgment motions, and *Daubert* motions, each party shall deliver to Chambers one (1) paper copy of its Opening, Response, and Reply Briefs, omitting attachments, no later than one week after the last-filed brief or at least a week before the hearing, whichever is earlier.
6. Plaintiff must file a notice informing the Court when an IPR is filed, the expected time for an institution decision, and the expected time for a final written decision, within two weeks of the filing of the IPR.
7. To the extent the parties need to email the Court, the parties should use the following email address: TXWDml\_LawClerks\_JudgeAlbright@txwd.uscourts.gov.

ORDERED this 5th day of October, 2020.

  
ALAN D ALBRIGHT  
UNITED STATES DISTRICT JUDGE

## APPENDIX A – DEFAULT SCHEDULE

Deadline	Item
7 days before CMC	Plaintiff serves preliminary <sup>4</sup> infringement contentions in the form of a chart setting forth where in the accused product(s) each element of the asserted claim(s) are found. Plaintiff shall also identify the earliest priority date ( <i>i.e.</i> the earliest date of invention) for each asserted claim and produce: (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.
2 weeks after CMC	Deadline for Motions to Transfer.
7 weeks after CMC	Defendant serves preliminary invalidity contentions in the form of (1) a chart setting forth where in the prior art references each element of the asserted claim(s) are found, (2) an identification of any limitations the Defendant contends are indefinite or lack written description under section 112, and (3) an identification of any claims the Defendant contends are directed to ineligible subject matter under section 101. Defendant shall also produce (1) all prior art referenced in the invalidity contentions, (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s), and (3) summary, annual sales information for the accused product(s) for the two years preceding the filing of the Complaint, unless the parties agree to some other timeframe.
9 weeks after CMC	Parties exchange claim terms for construction.
11 weeks after CMC	Parties exchange proposed claim constructions.
12 weeks after CMC	Parties disclose extrinsic evidence. The parties shall disclose any extrinsic evidence, including the identity of any expert witness they may rely upon with respect to claim construction or indefiniteness. With respect to any expert identified, the parties shall also provide a summary of the witness's expected testimony including the opinions to be expressed and a general description of the basis and reasons therefor. A

<sup>4</sup>The parties may amend preliminary infringement contentions and preliminary invalidity contentions without leave of court so long as counsel certifies that it undertook reasonable efforts to prepare its preliminary contentions and the amendment is based on material identified after those preliminary contentions were served, and should do so seasonably upon identifying any such material. Any amendment to add patent claims requires leave of court so that the Court can address any scheduling issues.

	failure to summarize the potential expert testimony in a good faith, informative fashion may result in the exclusion of the proffered testimony. With respect to items of extrinsic evidence, the parties shall identify each such item by production number or produce a copy of any such item if not previously produced.
13 weeks after CMC	Deadline to meet and confer to narrow terms in dispute and exchange revised list of terms/constructions.
14 weeks after CMC	Parties file Opening claim construction briefs, including any arguments that any claim terms are indefinite.
17 weeks after CMC	Parties file Responsive claim construction briefs.
19 weeks after CMC	Parties file Reply claim construction briefs.
20 weeks after CMC	Parties submit Joint Claim Construction Statement. In addition to filing, the parties shall jointly submit, via USB drive, Box (not another cloud storage), <sup>5</sup> or email to the law clerk, pdf versions of all as-filed briefing and exhibits. Each party shall deliver to Chambers paper copies of its Opening, Response, and Reply <i>Markman</i> Briefs, omitting attachments. Absent agreement of the parties, the Plaintiff shall be responsible for the timely submission of this and other Joint filings.
23 weeks after CMC (but at least 1 week before Markman hearing)	Parties submit optional technical tutorials. The parties shall also jointly submit, via USB drive, Box (not another cloud storage), or email to the law clerk, pdf versions of all as-filed briefing and exhibits.
24 weeks after CMC (or as soon as practicable)	Markman Hearing at [9:00 a.m. or 1:00 p.m.]
1 business day after Markman hearing	Fact Discovery opens; deadline to serve Initial Disclosures per Rule 26(a).
6 weeks after Markman hearing	Deadline to add parties.
8 weeks after Markman hearing	Deadline to serve Final Infringement and Invalidity Contentions. After this date, leave of Court is required for any amendment to Infringement or Invalidity contentions. This deadline does not relieve the Parties of their obligation to

<sup>5</sup> To the extent a party wishes to use cloud storage, the parties should contact the law clerk to request a Box link so that the party can directly upload the file to the Court's Box account.



	seasonably amend if new information is identified after initial contentions.
12 weeks after Markman hearing	Deadline to amend pleadings. A motion is not required unless the amendment adds patents or patent claims.
26 weeks after Markman	Deadline for the first of two meet and confers to discuss significantly narrowing the number of claims asserted and prior art references at issue. Unless the parties agree to the narrowing, they are ordered to contact the Court's Law Clerk to arrange a teleconference with the Court to resolve the disputed issues.
30 weeks after Markman hearing	Close of Fact Discovery.
31 weeks after Markman hearing	Opening Expert Reports.
35 weeks after Markman hearing	Rebuttal Expert Reports.
38 weeks after Markman hearing	Close of Expert Discovery.
39 weeks after Markman hearing	Deadline for the second of two meet and confer to discuss narrowing the number of claims asserted and prior art references at issue to triable limits. To the extent it helps the parties determine these limits, the parties are encouraged to contact the Court's Law Clerk for an estimate of the amount of trial time anticipated per side. The parties shall file a Joint Report within 5 business days regarding the results of the meet and confer.
40 weeks after Markman hearing	Dispositive motion deadline and <i>Daubert</i> motion deadline.
42 weeks after Markman hearing	Serve Pretrial Disclosures (jury instructions, exhibits lists, witness lists, discovery and deposition designations).
44 weeks after Markman hearing	Serve objections to pretrial disclosures/rebuttal disclosures.
45 weeks after Markman hearing	Serve objections to rebuttal disclosures and <b>File</b> Motions <i>in limine</i> .

46 weeks after Markman hearing	File Joint Pretrial Order and Pretrial Submissions (jury instructions, exhibits lists, witness lists, discovery and deposition designations); file oppositions to motions <i>in limine</i>
47 weeks after Markman hearing	File Notice of Request for Daily Transcript or Real Time Reporting. If a daily transcript or real time reporting of court proceedings is requested for trial, the party or parties making said request shall file a notice with the Court and e-mail the Court Reporter, Kristie Davis at kmdaviscsr@yahoo.com  Deadline to meet and confer regarding remaining objections and disputes on motions <i>in limine</i> .
3 business days before Final Pretrial Conference.	File joint notice identifying remaining objections to pretrial disclosures and disputes on motions <i>in limine</i> .
49 weeks after Markman hearing (or as soon as practicable)	Final Pretrial Conference. The Court expects to set this date at the conclusion of the <i>Markman</i> Hearing.
52 weeks after Markman hearing (or as soon as practicable) <sup>6</sup>	Jury Selection/Trial. The Court expects to set these dates at the conclusion of the <i>Markman</i> Hearing.

<sup>6</sup> If the actual trial date materially differs from the Court's default schedule, the Court will consider reasonable amendments to the case schedule post-*Markman* that are consistent with the Court's default deadlines in light of the actual trial date.